Supreme Court, U.S.
FILED
JUN 9 - 2004

No. 03-1665

IN THE

Supreme Court of the United States

JAMES BANKHEAD AND CHARLES BALLARD, PETITIONERS

v.

KURT KNICKREHM, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; ARTEE WILLIAMS, DEPUTY DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; AND SHELBY MCCOOK, CHIEF FISCAL OFFICER OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARCELIERS HEWETT
Counsel of Record
1919 W. Tenth Street
Little Rock, AR 72202
(501) 372-1854
Attorney for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Whether the collateral order doctrine, which permits an interlocutory appeal of a district court's order denying qualified immunity, permits an interlocutory appeal to the circuit court when the district court has determined that the summary judgment record raised genuine issue of fact?

2. Whether the concept of pendent appellate jurisdiction, which gives the circuit court discretion to exercise jurisdiction over an appeal of another order at the same time as a collateral order, is proper if review of the non-collateral order is not necessary to ensure meaningful review of the collateral order, and is not inextricably intertwined in the collateral order?

3. Whether the Eighth Circuit had jurisdiction to review immediately the district court's denial of the Arkansas Department of Human Services' motion for summary judgment, when they were not named as a party in the appeal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF FACTS 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 18

APPENDIX

CIRCUIT COURT ORDER (03/11/04) 1a

DISTRICT COURT ORDER (05/07/03) 11a

TABLE OF AUTHORITIES

Page

CASES

BEHRENS v. PELLETIER, 516 U.S. 299, 116 S. CT. 834, 133 L. ED. 2D 773 (1996) 11, 12

COHEN v. BENEFICIAL INDUSTRIAL LOAN CORP., 337 U.S. 541, 69 S. CT. 1221, 93 L. ED. 1528 (1949) 8, 14

DIGITAL EQUIPMENT CORP. v. DESKTOP DIRECT, INC., 511 U.S. 863, 867, 114 S. CT. 1992, 1995, 128 L. ED. 2D 842 (1994) 14

JOHNSON v. JONES, 515 U.S. 304, 115 S. CT. 2151, 132 L. ED. 2D 238 (1995) ..... *passim*

LOCKRIDGE v. BOARD OF TRUSTEES, UNIV. OF ARK., 315 F. 3D 1005, 1008 (8TH CIR. 2003) (EN BANC) 17

MITCHELL v. FORSYTH, 472 U.S. 511, 105 S. CT. 2806, 86 L. ED. 2D 411 (1985) 8, 9, 10, 12

NATALE v. RIDGEFIELD, 927 F. 2D 101, 104 (2D CIR. 1991) 15, 16

ROQUE-RODRIGUEZ v. LEMA MOYA, 926 F. ED 103, 105 (CA1. 1991) 16

SILVER STAR ENTERPRISES v. M/V SARAMACCA, 19 F. 3D. 1008, 1014 (CA5, 1994) 16

SWINT v. CHAMBERS COUNTY COMM'N, 511 U.S. 42, 115 S. CT. 1203(1995) 17

SWINT V. CHAMBERS COUNTY COMM'N, 514 U.S. 35, 115 S. CT. 1203, 131 L. ED. 2D 60 (1995) 14

VALDERS STONE & MARBLE, INC. V. C-WAY CONSTRUCTION CO., 909 F. 2D 259, 262 (CA7 1990) 16

VALIENTE V. RIVERA, 966 F. 2D 21, 23 (LST CIR. 1992) 9

OTHER AUTHORITIES

28 U.S.C. § 1254 1

28 U.S.C. § 1291 ..... 1, 8

42 U.S.C. § 1983 8

OPINIONS BELOW

The Eighth Circuit Court of Appeals decision is reported at 360 F. 3d, 839 (8th Cir. 2004) and is attached to the petition at Appendix (App.) p. 1a. The District Court opinion is reported as 264 F. Supp. 2d 805 (EO Ark 2004) in the Federal Supplement and is attached to the petition at App. p. 11a.

JURISDICTION

The Eighth Circuit filed its decision on March 11, 2004. This Court has jurisdiction under 28 U.S.C. § 1254 (I) to review the circuit Court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1291

The court of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeal from all final decisions of the district courts of the United States, the United States district court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF FACTS

The Petitioners, James Bankhead and Charles Ballard are African American males who are and have been at all relevant times, employees of the Arkansas Department of Human Services. Petitioner Bankhead began his employment with the Department of Human Services in January 1972 and was promoted to his current position of Payroll Manager, (Grade 22) in October 1995. Petitioner Ballard began his employment with the Department in November 1988 and was promoted to the position of Accounts Payable Manager, (Grade 22) in 1995.

On September 17, 2000, Respondent Shelby McCook, a White male, was appointed to the position of Chief Fiscal Officer for the Department of Human Services. In this position, McCook was a supervisor of both Petitioners. McCook's direct supervisor was Respondent Artee Williams, a Black male who held the position of Deputy Director of the Department of Human Services. Respondent Williams direct supervisor was Respondent Kirk Knickrehm, a White male and Director of DHS.

Soon after Respondent McCook became the Chief, Fiscal Officer of the Department of Human Services, he began a systematic program of harassment and intimidation against Petitioners. These acts of harassment and intimidation were designed to undermine the Petitioner' authority and create a hostile work environment.

In January 2001, Petitioner Bankhead made a formal complaint to Respondent McCook. In this

Complaint, he informed Respondent McCook of the unfair and harassing treatment he was being subjected to and requested that it be rectified. Respondents Williams and Knickrehm were provided with a copy of this Complaint.

On or about January 3, 2001, Petitioner Bankhead was called into a meeting with Respondents Artee Williams, Kurt Knickrehm and his immediate supervisor Brenda Jackson. In this meeting, there was an attempt by Respondents Williams, McCook and Knickrehm to blame Petitioner Bankhead solely for a problem concerning the checking of allotment balances before submitting Developmental Disability Services (DDS) payroll vouchers. However, Petitioner Bankhead questioned why other responsible parties were not present at the meeting. He was not given a satisfactory explanation.

In early February 2001, Respondents McCook and Williams devised a scheme to circumvent the competitive hiring process required by State Government and hire a White female into the Office of Fiscal Management. In this scheme, Respondent McCook temporarily borrowed a Grade 99 position from the Division of Mental Health Services. He then placed this White female, Linda Holmstrom, in this position without any competition. He did this with the intent of transferring her to a Grade 24 position as soon as possible. Thereby, circumventing the advertising and competition requirements of State Government. Respondent Williams had input into this scheme and advised Respondent McCook.

On February 20, 2001, Petitioners Bankhead and Ballard made a formal complaint to Respondent Knickrehm complaining about the hiring of Linda Holmstrom into the Office of Fiscal Management. In this complaint, the Petitioners complained about Respondent McCook's selective use of the hiring policy and the fact that they had not been given an opportunity to apply and be considered for the higher graded position. They also complained about the fact that Linda Holmstrom, who was less qualified, was hired directly into a Grade 99 position and was making $60,000.00 a year. They also complained about the fact that the position had never been advertised or announced, even though it had been the past practice within the Office of Fiscal Management to advertise and test Grade 99 applicants before making a decision to hire.

In April 2001, Respondent Williams requested that the Office of Employee Relations conduct an investigation of the Petitioners' February 2001 complaint. This investigation was completed on April 18, 2001 and the results were forwarded to Respondent Knickrehm. The Employee Relations investigation found that Mr. McCook had plans to place Linda Holmstrom in a Grade 24 position without competition, and that Respondent McCook did not know how or where Linda Holmstrom would fit into his organizational structure. Respondents Williams and Knickrehm took no action after receiving the results of the Employee Relations investigation.

In April 2001, the Petitioners filed discrimination complaints with EEOC complaining about the disparate treatment to include race and sex discrimination and

retaliation. Soon after the Petitioners filed their EEOC complaints, the harassment and disparate treatment by Respondent McCook intensified. The Petitioners' work was scrutinized unfairly, and they were treated different than similarly situated White managers.

In June 2001, Respondents Williams and McCook had DHS's Human Resources Department advertise and post a position titled, DHS Business Manager. This was to be a Grade 24 position and would be under the direct control of Respondent McCook.

In July 2001, Petitioners Bankhead and Ballard applied for the DHS Business Manager position and were interviewed by Respondent McCook. However, in August 2001, they were informed by Respondent McCook that they had not been selected for the position. A few days after being notified that they had not been selected for the position of DHS Business Manager, the Petitioners learned that Linda Holmstrom had been selected to fill the position.

In September 2001, the Respondents moved Petitioner Bankhead from under the direct control of Brenda Jackson and placed him under the direct control of Linda Holmstrom.

STATEMENT OF THE CASE

Petitioners filed a cause of action in the U.S. District against the Arkansas Department of Human Services and three of its employees. The three individual employees were sued in both official and individual capacities. The Department of Human

Service was sued pursuant to Title VII of the Civil Rights Act.

In this cause of action the Petitioners alleged that the Department of Human Services and the individual employees, acting under the color of state law had discriminated and retaliated against them and had violated their First Amendment and equal protection rights.

The Respondents filed a motion for summary judgment contending that they did not violate petitioners' First Amendment and equal protection rights and did not discriminate and retaliate against petitioner because of their race. The respondents also claimed that the individual respondents were entitled to qualified immunity.

The district court denied the Respondents' motion in part and granted it in part. It denied summary judgment on Department of Human Services Title VII claim; the equal protection claim; the injunctive relief claim; the retaliation claim; the First Amendment claim and the qualified immunity claim. Based on the denial of qualified immunity the Respondents filed an interlocutory appeal.

The interlocutory appeal did not include the Arkansas Department of Human Services as a party and only raised the issue of qualified immunity as it related to individual Respondent Knickrehm. No mention was made of the denial of qualified immunity as it related to Respondents' Williams and McCook.

The interlocutory appeal did include the First Amendment claims, and retaliation claims but did not mention the Title VII or the equal protection claims.

The Petitioner responded to Respondents' appeal stating that the circuit court did not have jurisdiction because the district court's denial of qualified immunity was based on a matter of fact and not law. The Petitioner also set forth facts to support its claim that Respondent Knickrehm was not entitled to qualified immunity and that there were material facts in dispute as to the First Amendment and retaliation claims.

The circuit court rules that Respondent McCook (who had not been mentioned in the Respondent's brief) did not have any intent to discriminate, therefore, he and the other individual Respondents were entitled to qualified immunity and because the answer to the qualified immunity question included a determination of whether any constitutional or statutory rights were violated in the first place, the Court was dismissing the entire complaint.

----------◆----------

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION TO ACCEPT THIS CASE ON AN INTERLOCUTORY APPEAL PUTS IT IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

28 U.S.C. § 1291 grants appellate courts jurisdiction to hear appeals only from "final decision" of the district court. However, there are some exceptions to this rule. One of these is the collateral order doctrine. This exception arises frequently in civil rights actions brought against Federal, state and local officials pursuant to 42 U.S.C. § 1983.

The collateral order doctrine exception permits a defendant who has filed a motion to dismiss or a motion for summary judgment on the issue of qualified immunity and who has had that motion denied by the district court to immediately appeal that decision to the circuit court if the denial of the motion turns on a matter of law. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806; 86 L. Ed. 2d 411 (1985).

The *Mitchell* decision established that denial of qualified immunity is an appealable interlocutory decision under the collateral order doctrine established by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528.

The denial of qualified immunity meets the *Cohen* criteria if an order denying qualified immunity "conclusively determines the question" and the issue involves a "claim of right separable from and collateral to, the rights asserted in the action. *Mitchell*, Supra at

P. 527.

In order for a district court's interlocutory order denying qualified immunity to be immediately appealable under the collateral order doctrine, the district court's order must satisfy three requirements for appealability under this doctrine.

First, the interlocutory order denying qualified immunity must conclusively determine the issue of qualified immunity. Thus, an order that prevents the defendant from presenting a qualified immunity defense is sufficiently conclusive to be immediate appealable. *Valiente v. Rivera*, 966 F. 2d 21, 23 (lst Cir. 1992).

Secondly, the interlocutory order denying qualified immunity must determine an issue that is separate from the merits of the case. In other words if the question of immunity can be decided by the circuit court as a matter of law, then it is considered to be a matter separate from the factual merits of the case and immediately appealable. *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

Thirdly, the interlocutory order denying qualified immunity must be effectively unreviewable after a final judgment.

In this case, the requirement that the interlocutory order denying qualified immunity determine an issue that is separate from the merits of the case was not met, therefore, the circuit court's decision to accept and decide the case was in conflict with the Supreme Court rulings in *Mitchell v. Forsyth*,

472 U.S. 511, 527-529, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) and *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

Generally in applying the *Mitchell* and the *Johnson* ruling, if the district court has denied a defendant's motion for summary judgment because of the existence of a genuine factual dispute about what occurred the district court's order would fail to meet the prerequisite that the issue of qualified immunity be separate from the merits of the case. For example, under the plaintiff's version of the facts immunity might be inapplicable, while under the defendant's version of the facts qualified immunity would apply. In such a case, the court of appeals cannot decide the qualified immunity issue as a matter of law, since the applicability of the defense will depend on what facts are found after trial. In effect, an interlocutory appeal would require the circuit court to consider an issue that is not separate from the factual merits of the case.

That is exactly what has occurred in this case. According to the order of the district, an analysis of the alleged facts was made and a comparence was made between what the defendants claimed in their summary judgment motion and what the plaintiff claimed in response thereto. Based on this comparison, the district court found that there was a dispute as to the facts of the case, and state in its opinion, "in light of all the above issues raised by plaintiffs, I find that there is a question of material fact as to whether defendants proffered reason for hiring Holmstrom into the Grade 24 position was the true reason for hiring or was a pretext for discrimination."

It should also be noted that circuit courts opinion goes well pass analyzing the legal issue of the case and takes the position of analyzing the facts in a light most favorable to the defendant and deciding the main disputed fact of the case, which is whether Holmstrom was more qualified for the position than the two Petitioners. This is a fact-based determination and is not separate from the merits of the case. *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773.

Behrens has held that "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claims, and hence there is no final decision under (the collateral order doctrine) *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773, 787-788 (1996).

In *Johnson v. Jones*, the Court made it clear that the collateral order doctrine does not permit an appeal from an order denying a motion for summary judgment if the issue raised is "whether or not the evidence in the pretrial record is sufficient to show a genuine issue of fact for trial. Id. At 307, 115 S. Ct. 2151.

Johnson involved an action under 42 U.S.C.§ 1983 against five police officers for use of excessive force in effecting an arrest. Id. Three of the officers moved for summary judgment, arguing that there was insufficient evidence in the summary judgment record to permit a reasonable finder of fact to find that they were present when the plaintiff was beaten. Id. The district court denied this motion, concluding that there was enough evidence to defeat summary judgment. Id.

At 308, 115 S. Ct. 2151. The officers appealed and invoked the collateral order doctrine, but the Supreme Court unanimously held that appellate jurisdiction was lacking. Id. The Court held that Mitchell does not authorize an appeal from an order denying summary judgment if the order, "though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial." Id. at 314, 115 S. Ct. 2151. As we understand *Johnson*, if a defendant in a constitutional rights case moves for summary judgment based on qualified immunity and the district court denies the motion, the circuit court lacks jurisdiction to consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove; but the circuit court does possess jurisdiction to review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right.

The *Johnson* court also noted that "the existence, or nonexistence, of a triable issue of fact [] is the kind of issue that trial judges, not appellate judges, confront almost daily, " and the Court added that "[i]nstitutionally speaking, appellate judges enjoy no comparative expertise in such matters." Id. at 316, 115 S. Ct. 2151.

The Eighth Circuit has failed to take into account that the collateral order doctrine, is not proper when the district court has determined and set forth in its order genuine issues of fact. Therefore, the Eighth Circuit's decision is in direct conflict with *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985 and *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct.

2151, 132 L. Ed. 2d 238 (1995). Because of this conflict certiorari should be granted.

The grant of certiorari is warranted to resolve a split between the Eighth Circuit and the Supreme Court as to whether the collateral order doctrine permits an interlocutory appeal to the circuit court when the district court has determined that the summary judgment record raised genuine issue of material fact.

II. THE EIGHTH CIRCUIT'S DECISION TO EXERCISE PENDENT APPELLATE JURISDICTION OVER THE DISTRICT COURT'S ORDER DENYING SUMMARY JUDGMENT TO THE DEPARTMENT OF HUMAN SERVICE AND INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITY PUTS IT IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT AND OTHER COURTS.

In this case, the question has arisen as to whether a circuit court may exercise jurisdiction over an appeal of another order at the same time that a collateral order is being reviewed.

By statute 28 U.S.C.§ 1291 Federal Court of Appeals have jurisdiction of appeals from all final decisions of the district courts. However, as previously stated, the collateral order doctrine may be used to appeal certain district court orders, which are not final decisions. The collateral order doctrine is best understood not as an exception to the "final decision" rule laid down by Congress in § 1291, but as a "practical construction of it." *Digital Equipment Corp. v. Desktop*

Direct, Inc., 511 U.S. 863, 867, 114 S. Ct. 1992, 1995, 128 L. Ed. 2d 842 (1994) (quoting *Cohen*, 337, U.S.; at 546, 69 S. Ct. at 1226).

In *Cohen*, the Court held that § 1291 not only permitted appeals from a final decision by which a district court disassociates itself from the case, but also from a small category of decisions which do not end the litigation but must nonetheless be considered as "final". However, that small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action. Id. At 546, 69 S. Ct. at 1225-1226.

In *Swint v. Chambers County Comm'n, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995).* A unanimous court ruled that although the Eleventh Circuit had jurisdiction to immediately review a district court's denial of summary judgment motion on qualified immunity grounds, the Court of Appeals did not have jurisdiction to address an unrelated question of liability presented by the co-defendant. Id at pp. 1207.

In *Swint* the police raided a Chambers County, Alabama night club and two of the club's owners, an employee and one of the patrons sued the Chambers County Commission, along with a municipality and three individual police officers. The plaintiffs sought damages and other relief under 42 U.S.C.§ 1983 for civil rights violations. The defendants filed a summary judgment motion and the district court denied the summary judgment motion as to all five of the defendants. The district court ruled that the individual officers were not entitled to qualified immunity from

suit and that the sheriff who authorized the raid, may have been the county's final policymaker for law enforcement. The district court also stated that it would rule on the county's liability before jury deliberation. Based on *Mitchell v. Forsyth*, the individual defendants immediately appealed. The county commission also appealed, arguing that the denial of its summary judgment motion was immediately appealable as a collateral order, and alternatively that the Eleventh Circuit had "pendent appellate jurisdiction to decide the questions presented by the commission. The Eleventh Circuit rejected the county commission's argument that the denial of its summary judgment was immediately appealable as a collateral order, but did assert pendent jurisdiction over the commission's appeal and held that the county commission qualified for summary judgment. However, the Supreme Court ruled that "there was no "pendent party" appellate jurisdiction of the kind the Eleventh Circuit purported to exercise.

In *Swint*, the Supreme Court went on to explain that although the Eleventh Circuit had jurisdiction to immediately review the denial of the individual officers' summary judgment motions (on qualified immunity) it did not thereby gain authority to review at once the unrelated question of the county commission's liability.

It is well established that pendent appellate jurisdiction is appropriate only in "exceptional circumstance". *Natale v. Ridgefield*, 927 F. 2d 101, 104 (2d Cir. 1991).

The Federal Courts of Appeals have endorsed the doctrine of pendent appellate jurisdiction, although

they have expressed varying views about when such jurisdiction is properly exercised.

The First Circuit has reframed from exercising pendent appellate jurisdiction, characterizing the circuit's practice as "self-imposed". *Roque-Rodriguez v. Lema Moya*, 926 F. Ed 103, 105 (CA1. 1991).

The Second Circuit has stated that "only in exceptional circumstances should litigants, over whom this Court cannot ordinarily exercise jurisdiction, be permitted to ride on the jurisdictional coattails of another party; *Natale v. Ridgefield*, 927 F. 2d 101, 104 (CA2 1991).

The Fifth Circuit has declined to exercise pendent appellate jurisdiction because otherwise nonappealable order was not "inextricably entwined" with appealable order; *Silver Star Enterprises v. M/V Saramacca*, 19 F. 3d. 1008, 1014 (CA5, 1994).

The Seventh Circuit's position is that pendent appellate jurisdiction is proper only when ordinarily unappealable interlocutory order is inextricably entwined with an appeasable order and there are compelling reasons for immediate review. It also ruled that a close relationship between the two orders does not suffice. *Valders Stone & Marble, Inc. v. C-Way Construction Co.*, 909 F. 2d 259, 262 (CA7 1990).

In this case, the Arkansas Department of Human Services was named as one of the defendants pursuant to Title VII of the Civil Rights Act. The defendants filed a motion for summary judgment on behalf of all the defendants, including the Arkansas Department of

Human Services. The district court denied the Arkansas Department of Human Services' motion for summary judgment based on its finding that a question of material fact existed. The defendants then took an interlocutory appeal pursuant to *Mitchell v. Forsyth*. However, the defendants only named the individual defendants in their appeal to the circuit court. They did not discuss nor request any relief for the Arkansas Department of Human Services. Therefore, the Arkansas Department of Human Services was not a party to the circuit court appeal. However, the circuit court held that under their prior decision in *Lockridge v. Board of Trustees, Univ. of Ark.*, 315 F. 3d 1005, 1008 (8th Cir. 2003) (en banc) they had the authority to go beyond their ordinarily narrow qualified immunity jurisdiction and make decisions concerning other defendants. Therefore, the circuit court reversed the order of the district court and remanded the case back to the district court with an order to dismiss the plaintiff's complaint. This action of the circuit court was in direct conflict with *Swint v. Chambers County Comm'n, 511 U.S. 42, 115 S. Ct. 1203(1995).*

This case did not present an exceptional circumstance because the issues of summary judgment and the issues of qualified immunity were not inextricably intertwined and the issue of qualified immunity could have been decided without reviewing the facts related to summary judgment.

The Eighth Circuit's decision squarely conflicts with the holdings of other courts and is in direct conflict with *Swint v. Chambers*. Review is necessary so that this Court may remedy the Eighth Circuit's error and bring certainty to the proper use of pendant appellate

jurisdiction.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

MARCELIERS HEWETT
Counsel of Record
1919 West 10th Street
Little Rock, AR 72202
(501) 372-1854
Attorney for Petitioners

(Any footnotes trail end of each document)

No. 03-2356EA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James Bankhead and Charles Ballard,
Appellees,

v.

Kurt Knickrehm, Director of the Arkansas Department of Human Services; Artee Williams, Deputy Director of the Arkansas Department of Human Services; and Shelby McCook, Chief Fiscal Officer of the Arkansas Department of Human Services,
Appellants.

January 12, 2004, Submitted
March 11, 2004, Filed

COUNSEL: For JAMES BANKHEAD, CHARLES BALLARD, Plaintiffs - Appellees: Marceliers Hewett, Little Rock, AR.

For KURT KNICKREHM, Director of the Arkansas Department of Human Services, ARTEE WILLIAMS, Deputy Director of the Arkansas Department of Human Services, SHELBY MCCOOK, Chief Fiscal Officer of the Arkansas Department of Human Services, Defendants - Appellants: Lori L. Freno, Sherri L. Robinson, Mark A. Hagemeier, ATTORNEY GENERAL'S OFFICE, Little Rock, AR.

JUDGES: Before WOLLMAN, RICHARD S. ARNOLD, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

OPINION BY: RICHARD S. ARNOLD

OPINION: RICHARD S. ARNOLD, Circuit Judge.

This is an interlocutory appeal from the denial of summary judgment on the issue of qualified immunity. Plaintiffs, James Bankhead and Charles Ballard, both black men, allege several causes of action arising from their employment with the Arkansas Department of Human Services. Plaintiffs allege that they were discriminated against on account of their race and retaliated against by defendants, Shelby McCook, Artee Williams, and Kurt Knickrehm, officials of the Arkansas Department of Human Services.

The District Court held that material factual disputes existed, requiring the denial of summary judgment for the defendants on their defense of qualified immunity. This interlocutory appeal followed. We respectfully disagree with the District Court. In our opinion, the summary-judgment record does not support a finding of discrimination or retaliation, the claims made by plaintiffs. We therefore reverse and remand for entry of judgment in favor of defendants.

I.

Both plaintiffs are black men employed by the Arkansas Department of Human Services. Mr. Bankhead began his employment at the Department of Human Services in January 1972, and at the time of

trial served as payroll manager in General Operations. Mr. Ballard began his employment with the Department of Human Services in 1988 and served as accounts-payable manager in General Operations. Defendant McCook was an indirect supervisor of both plaintiffs and served as Chief Fiscal Officer. Mr. Knickrehm and Mr. Williams served as Director and Deputy Director of the Department, respectively, and were at all times relevant to the case Mr. McCook's supervisors.

Plaintiffs claim that soon after Mr. McCook was hired as Chief Fiscal Officer he "began a systematic program of harassment and intimidation against [plaintiffs]." Br. of Appellee 2. In February 2001, Linda Holmstrom, a woman, was hired in a Grade 99 position with the Office of Fiscal Management at the Department of Human Services. A Grade 99 position is an unclassified position, for which the Department of Human Services is not required to advertise. However, the position must be approved by the Director, Mr. Knickrehm. Plaintiffs argue that this was the first step in the conspiracy to hire Ms. Holmstrom as Business Manager, and to circumvent the regular hiring process in order to discriminate against them.

On February 20, 2001, plaintiffs and James Bowman, a white man, filed a complaint with Mr. Knickrehm regarding the hiring of Ms. Holmstrom. The plaintiffs allege that the hiring policy was used selectively to their disadvantage. The complaint alleges that plaintiffs attempted to meet with Mr. McCook about his decision to hire Ms. Holmstrom, and that Mr. McCook refused this request. Plaintiffs complained that they were not respected by Mr. McCook and should have been given

the opportunity to apply for the Grade 99 position. Plaintiffs also asserted that Mr. McCook "apparently has no management style," and has been difficult to work under. The complaint also asserts that "he has different rules for different people. His treatment and work expectations are based on whether or not you are his lunch buddy. He makes no effort to reward people who are on board . . . routine vendor and employee inquiries have been blown out of proportion . . .." App. 252. The plaintiffs briefly assert that Mr. McCook's attitudes and decisions are based upon his "attitude toward minorities." App. 254. After receiving this complaint, Mr. Knickrehm ordered an internal investigation. On April 18, 2001, Verma Simmons, to whom the investigation had been assigned, issued a report summarizing her conclusions, stating that her office found no evidence that Mr. McCook's hiring was based on any unlawful discrimination.

On March 22, 2001, the plaintiffs filed another internal complaint with Mr. Williams, alleging retaliation by Mr. McCook. Ms. Simmons issued another report stating that the plaintiffs could not prove retaliation because they could not prove that Mr. McCook had any knowledge of the previous complaints against him.

In June 2001, the Department of Human Services advertised an opening for the position of Business Manager. The position was a classified, Grade 24 position in the Office of Fiscal Management under the direct supervision of Mr. McCook. The listing for the position required the following: knowledge of Generally Accepted Accounting Principles; experience in payroll administration; knowledge of state and federal

accounting rules, budgetary procedures, regulations, and rules relating to payroll; experience with information recording, reporting, and auditing; the ability to plan and direct all phases of general accounting functions; and the ability to interpret laws, policies, and procedures.

Plaintiffs each submitted an application for the position, along with Ms. Holmstrom, and Mr. McCook interviewed each applicant. During each interview, the candidates were asked the same preselected questions. Based upon each candidate's resume and interview, Mr. McCook assigned each applicant a score, and the candidate with the highest score was to be offered the position. Ms. Holmstrom received a 424, while Mr. Bankhead and Mr. Ballard received scores of 300 and 237, respectively. According to Department of Human Resources procedures, Ms. Holmstrom was therefore selected for the position. Mr. Ballard and Mr. Bankhead then filed charges with the EEOC, alleging race discrimination. Both plaintiffs were issued a right-to-sue letter, and on December 19, 2001, the plaintiffs filed suit in the District Court.

II.

This Court reviews the denial of qualified immunity de novo. Herts v. Smith, 345 F.3d 581, 584 (8th Cir. 2003). "We examine the facts alleged, or supported by the summary-judgment record, to see whether they support a claim that the defendants violated clearly established law." Ibid.

Because the District Court found that disputed issues of material fact existed with respect to the

qualified-immunity defense, plaintiffs assert that this Court lacks jurisdiction over the appeal. However, "[a] denial of summary judgment on the ground of qualified immunity may be reviewed on interlocutory appeal when the issue presented is a purely legal one: whether the facts alleged [or shown by the summary-judgment record] . . . support a claim of violation of clearly established law." Id. at 585 (quotations and citations omitted). The question on appeal is whether the summary-judgment record supports a finding that defendants violated clearly established law. Ibid. We hold that it does not.

The qualified-immunity defense protects "government officials performing discretionary functions." Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Government officials are "generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Ibid. Thus, we decide whether a defendant is entitled to qualified immunity according to an objective standard. Herts, 345 F.3d at 585.

Plaintiffs allege several causes of action against defendants, including discrimination and retaliation. All of the claims relate to the same basic facts: Mr. McCook hired Ms. Holmstrom, instead of the plaintiffs, for a Grade 24 position. The plaintiffs allege that Mr. McCook's selection was discriminatory and in retaliation for their speaking out against him.

We find no substantial evidence in this record that Mr. McCook discriminated or retaliated against the

plaintiffs. There could be a suspicion that the defendants, or some of them, intended from the beginning to hire Ms. Holmstrom as Business Manager, but we see no evidence of substance that either race or retaliation had anything to do with this plan, if there was a plan. Although Mr. McCook hired Ms. Holmstrom into the Grade 99 position without advertising it to other employees, Department of Human Services policy does not require that such a position be posted. Although plaintiffs' complaint alleges that prior practice dictated that such positions be posted, plaintiffs offer no evidence to prove such allegations. Plaintiffs are not free to rest on the allegations contained in their complaint when faced with a motion for summary judgment.

After Ms. Holmstrom accepted the Grade 99 position, Mr. McCook created the position of Business Manager and posted this position in accordance with Department of Human Services policy. The plaintiffs applied for, and interviewed for, this position, but neither was selected. Instead, Mr. McCook selected Ms. Holmstrom because her interview and resume score was higher than the scores of either of the two plaintiffs. Plaintiffs do not argue that the interview process was flawed or that it was tainted with discrimination; rather, they argue that Ms. Holmstrom was less qualified.

This record leaves no room for such a contention. Ms. Holmstrom has a Bachelor of Science in Business Administration with an emphasis in accounting, she is a licensed Certified Public Accountant, she has extensive experience in finance and accounting, and she has served as a Chief Financial Officer for various

companies. Mr. Bankhead and Mr. Ballard allege that they were more qualified for the position because they had more years of experience in the areas of finance and accounting and because they had more years of experience in state accounting. Although Mr. Bankhead and Mr. Ballard may have more experience in accounting if one counts raw years, Ms. Holmstrom's experience has generally encompassed a higher level of responsibility. She has worked independently for years, generally managing the finance and accounting section of a small business. Ms. Holmstrom is also a licensed Certified Public Accountant. Neither Mr. Bankhead nor Mr. Ballard is a licensed Certified Public Accountant. Although Mr. Bankhead and Mr. Ballard contend that this was not required by the job description, a Certified Public Accountant is expected to have a strong understanding of Generally Accepted Accounting Principles, state and federal accounting rules, and the other requirements that were listed in the posting for the position, so holding a license as Certified Public Accountant is certainly relevant. Plaintiffs offer no other evidence of discrimination. Absent some proof that the reasons given were merely a pretext for race discrimination, we cannot hold that there has been discrimination.

Our jurisdiction on this appeal is limited to the question of qualified immunity, but the answer to that question necessarily includes a determination whether any constitutional or statutory rights were violated in the first place. Lockridge v. Board of Trustees, Univ. of Ark., 315 F.3d 1005, 1008 (8th Cir. 2003) (en banc). We find no evidence in this record sufficient to support a finding that Mr. McCook selected Ms. Holmstrom for any reason other than her qualifications nor is there

any evidence of substance of wrongful intent (in the sense of discrimination or retaliation) against the other two defendants.

The complaint named the three defendants in both their individual and official capacities. Qualified immunity is a defense only against a claim in one's individual capacity. Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999). Suits against public employees in their official capacity are the legal equivalent of suits against the governmental entity itself. Buford v. Runyon, 160 F.3d 1199, 1201 n.3 (8th Cir. 1998) (quoting Kentucky v. Graham, 473 U.S. 159, 166, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)). Ordinarily, the question of the liability of a governmental entity, or of governmental officials sued in their official capacity, would not be open on an interlocutory qualified-immunity appeal. Here, however, our ground of decision in favor of the defendants in their individual capacity -- that there was not substantial evidence of illegal intent -- is of course also fatal to the official-capacity suit. On a qualified-immunity appeal, if the ground of decision would, as a necessary legal consequence, inevitably require a judgment for another defendant, or for the same defendants in another capacity, the ordinarily narrow nature of our qualified-immunity jurisdiction does not prevent us from saying so. Lockridge, 315 F.3d 1005 at 1012 at 1012-13.

Accordingly, this action should be dismissed in its entirety against all three defendants in their individual and official capacities.

The order of the District Court is reversed, and this case is remanded to that Court for dismissal of the complaint.

NO. 4:01CV00853 WRW

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, LITTLE ROCK DIVISION

JAMES BANKHEAD and CHARLES BALLARD, PLAINTIFFS

vs.

ARKANSAS DEPARTMENT OF HUMAN SERVICES, an Agency of the State of Arkansas; KIRK KNICKRHEM, Director of the Arkansas Department of Human Services; ARTEE WILLIAMS, Deputy Director of the Arkansas Department of Human Services; SHELBY McCOOK, Chief Fiscal Officer of the Arkansas Department of Human Services, DEFENDANTS

May 7, 2003, Decided
May 7, 2003, Filed

COUNSEL: For JAMES BANKHEAD, CHARLES BALLARD, plaintiffs: Marceliers Hewett, Attorney at Law, Little Rock, AR.

For ARKANSAS DEPARTMENT OF HUMAN SERVICES, KURT KNICKREHM, ARTEE WILLIAMS, SHELBY MCCOOK, defendants: Lori Freno, Sherri L. Robinson, Jeffrey Ryan Priebe, Arkansas Attorney General's Office, Little Rock, AR.

JUDGES: William R. Wilson, UNITED STATES DISTRICT JUDGE.

OPINION BY: William R. Wilson

OPINION:

SUMMARY JUDGMENT ORDER

Pending is Defendants' Motion for Summary Judgment (doc. no. 18). In their Complaint, Plaintiffs allege various causes of action relating to their employment with the Arkansas Department of Human Services ("DHS"). They name DHS and three of its employees, in both official and individual capacities, as Defendants. In their motion and supporting brief, Defendants claim they are entitled to summary judgment on all of Plaintiffs' claims. Plaintiffs have responded, asserting that summary judgment is inappropriate.

Background

The following facts are not disputed. Plaintiffs James Bankhead and Charles Ballard are African-American males who are, and have been at all relevant times, employed by DHS. Bankhead began his employment with DHS in January 1972 and was promoted to the Grade 22 position of payroll manager in the General Operations Section in October 1995. Ballard began his employment with DHS in November 1988 and was promoted to a Grade 22 management position in the General Operations Section in 1995.

On September 17, 2000, separate Defendant Shelby McCook, a white male, was appointed to the position of Chief Fiscal Officer for DHS. In this position, McCook was, at all relevant times, a supervisor of both Plaintiffs. McCook's supervisor was Defendant Artee Williams, an African-American male and the Deputy Director of DHS. Defendant Kirk Knickrhem, a white male and Director of DHS, was Williams' supervisor. At all times referenced in Plaintiffs' federal court Complaint, Defendants were acting within the scope of their employment.

In February 2001, Linda Holmstrom, a white female, was hired into a Grade 99 position with the Office of Fiscal Management ("OFM") at DHS. Defendant McCook borrowed n1 the Grade 99 position from the Mental Health division. A Grade 99 position within DHS is an unclassified position which DHS is not required to advertise or post. The DHS Director must approve the hiring decision before an unclassified position can be filled.

On February 20, 2001, Plaintiffs Bankhead and Ballard, along with James Bowman, a white male, forwarded a formal complaint about the hiring of Ms. Holmstrom to Defendant Knickrhem, claiming that the hiring of Ms. Holmstrom involved a selective use of the hiring policy. Following a request by Defendant Williams, DHS's Office of Employee Relations conducted an investigation into the February 2001 complaint. At the conclusion of the investigation, Verma Simmons, an African-American female and the Administrator of the Office of Employee Relations, issued a memorandum to Knickrhem stating that her office found no evidence that the actions of McCook in

hiring Holmstrom were based on race, sex, age, or any unlawful discrimination.

On March 22, 2001, Plaintiffs Bankhead and Ballard, along with James Bowman, forwarded another complaint to Williams. This complaint alleged retaliation by McCook. Following this complaint, Williams requested that the Office of Employee Relations conduct another investigation. Verma Simmons issued a memorandum to Williams stating that her office found none of the three complainants could state a prima facie case of retaliation because none of them could prove that McCook had knowledge of a complaint against him.

Plaintiff Ballard filed a charge with the EEOC on April 4, 2001, alleging discrimination based upon race, sex, and age, as well as retaliation. He stated that the last act of discrimination occurred on March 22, 2001. Ballard was issued a right to sue letter on or about April 17, 2001.

On April 5, 2001, Plaintiff Bankhead filed an EEOC charge, alleging discrimination based upon race and age, as well as retaliation. Bankhead was issued a right to sue letter on or about April 10, 2001.

In June 2001, in accordance with DHS policy, the Human Resources Department at DHS advertised and posted an opening for "DHS Business Manager." The position was a classified, Grade 24 position in the OFM and was to be under the supervision of Defendant McCook. The job description stated that the position was "governed by the Generally Accepted Accounting Principles, state and federal laws and agency policy." n2

The knowledge, abilities, and skills required for the position included, in part, "Knowledge of Generally Accepted Accounting Principles and fiscal management including payroll administration; Knowledge of state and federal accounting rules, budgetary procedures, regulations, policies and rules relating to payroll, information recording, reporting and auditing; ... Ability to plan and direct all phases of the general accounting functions; [and] ... Ability to interpret laws, policies, and procedures." n3

Bankhead, Ballard, and Linda Holmstrom all submitted applications for the Grade 24 position. Each of them interviewed for the position. Defendant McCook conducted the interviews for all applicants, including Bankhead, Ballard, and Holmstrom.

According to Linda Holmstrom's employment application, she has a Bachelor of Science in Business Administration ("BSBA") with a concentration in accounting and a Certified Public Accountant's ("CPA") license. She had previously served as Chief Financial Officer for over five years for various private companies; had worked in the areas of finance and tax for over twenty years; and had worked from approximately 1975 to 1981 as an accountant and accounting supervisor at Henderson State University.

Neither Bankhead nor Ballard have CPA licenses, n4 and neither have served as a Chief Financial Officer. Bankhead's employment application shows that he has a degree in industrial education. Ballard, like Holmstrom, has a BSBA with an emphasis in accounting. Ballard supervised from 16 to 23 state employees between 1988 and 2001. n5 Bankhead

supervised about 15 employees with the Department of Youth Services from 1978 to 1986 and supervised from 17 to 35 employees with DHS from 1986 to 2001. n6 Ballard has worked in the areas of finance and tax for approximately thirty-one years, and Bankhead has approximately twenty-nine years of such experience. Ballard has over thirteen years experience in state accounting, and Bankhead has over sixteen years in state accounting. n7

Following the application process, the applicants were scored according to DHS procedure. n8 Ballard received a 237, Bankhead received a 300, and Holmstrom received a 424. n9 Ultimately, Holmstrom was selected for, and accepted, the Grade 24 Business Manager position. n10

Ballard filed a second EEOC charge on November 5, 2001, in which he checked boxes claiming that he was discriminated against based on his race and sex in not receiving the promotion to the Grade 24 position during August 2001. Ballard did not allege retaliation or sex discrimination in the body of his second EEOC charge. Bankhead filed a second EEOC charge on October 22, 2001, alleging that he was discriminated against on September 21, 2001, based on his race and age. Bankhead did not allege retaliation or sex discrimination in the body of his second EEOC charge. Both Plaintiffs are still employed by DHS in Grade 22 positions.

On December 19, 2001, Plaintiffs filed their Complaint in this Court, alleging that Defendants' decision to select Linda Holmstrom, and not to select Plaintiffs for the Grade 24 position, was based on

Plaintiffs' race. They claim that Williams and Knickrhem condoned the actions of McCook, subjecting Plaintiffs to deprivation of their First Amendment rights. They further allege retaliation and Fourteenth Amendment violations by Defendants. Plaintiffs base their claims on Title VII, 42 U.S.C. § 1981, § 1983, and § 1985(3) and request injunctive relief, actual and consequential damages, compensatory damages, and punitive damages. Defendants request summary judgment on all causes of action asserted in the Complaint.

Standard

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds. n11 The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. n12

The Court of Appeals for the Eighth Circuit has cautioned that summary judgment is an extreme remedy that should only be granted when the movant has established a right to the judgment beyond controversy. n13 Nevertheless, summary judgment is

important for promoting judicial economy by preventing trial when no genuine issue of fact remains. n14 This court must view the facts in the light most favorable to the party opposing the motion. n15

The Eighth Circuit has set out the burden of the parties in connection with a summary judgment motion:

> The burden on the party moving for summary judgment is only to demonstrate, *i.e.*, "[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted. n16

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. n17

Courts must use caution in granting summary judgment in discrimination cases, where inferences are often the basis of the claim, because "summary

judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." n18

Discussion

I. Title VII Claims Resulting From First EEOC Charges

Defendants claim that, because Plaintiffs failed to timely file a lawsuit after their initial EEOC charges, this Court lacks subject-matter jurisdiction over the allegations made by Plaintiffs in their April 2001 EEOC charges. Additionally, Defendants claim that this Court lacks jurisdiction over Plaintiffs' retaliation claims because claims for retaliation were included in their first EEOC charges but did not appear in their second EEOC charges.

Plaintiff Ballard's April 2001 EEOC charge stated that he believed he was discriminated against when he was denied the opportunity to apply for the Grade 99 position of Mental Health Assistant Deputy Director, Administrative Services, in February 2001. Ballard also asserted that he was retaliated against as recently as March 2001 following the filing of a written grievance. n19 Plaintiff Bankhead's April 2001 EEOC charge stated that, beginning in January 2001, he was subjected to harassment by the Chief Fiscal Officer in that he was held accountable for mistakes that were the responsibility of other departments and that his work was scrutinized. The charge also stated that Bankhead's section was more closely scrutinized after he made complaints regarding treatment based on race. Additionally, Bankhead's charge asserted that he was

denied consideration for a newly-created position and that a white female with several years less experience was selected for the position. n20

Ballard received a right to sue letter from the EEOC on April 17, 2001. Bankhead received his right to sue letter on April 10, 2001. Both right to sue letters clearly stated that Plaintiffs had 90 days to file a lawsuit based on the allegations in the charge or their right to sue would be lost. n21 Plaintiffs did not file suit in this Court until December 19, 2001, more than one hundred and fifty days after each of their 90-day deadlines had passed. Defendants assert that Plaintiffs are barred from asserting any claims of discrimination or retaliation based on events that occurred before April 2001, including the hiring of Linda Holmstrom into the Grade 99 position.

An employee filing a Title VII claim in federal court must first exhaust available administrative remedies. This "provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts." n22 In order to exhaust available administrative remedies, an individual must timely file a charge of discrimination with the EEOC setting forth the facts and nature of the charge and receive notice of the right to sue. n23 An employee who receives a right to sue letter from the EEOC has 90 days in which to file suit. n24 Though the issue is not one of subject-matter jurisdiction, as Defendants suggest, n25 the Eighth Circuit has held that a plaintiff is barred from asserting claims based on events which formed the basis of a previous EEOC charge that was

not timely sued upon, even where the plaintiff timely files a second EEOC charge. n26

In the present case, it is undisputed that neither Plaintiff filed suit within 90 days of receiving their right to sue letters on the April 2001 EEOC charges. For that reason, claims under Title VII based upon the events forming the basis for those charges are barred by statute of limitation. Defendants' summary-judgment motion is GRANTED in this respect. However, the statute of limitation does not bar Plaintiffs from bringing a cause of action on those same events under 42 U.S.C. § § 1981, 1983, and 1985.

Defendants also assert that this Court lacks subject-matter jurisdiction to hear Plaintiffs' retaliation claims. Defendants point out that both Plaintiffs failed to raise any allegations of retaliation in their second EEOC charges, filed in October and November of 2001, and assert that Plaintiffs have failed to exhaust all administrative remedies by not filing charges of retaliation with the EEOC within 180 days of the alleged unlawful discrimination. Plaintiffs acknowledge that they both failed to raise the issue of retaliation in their second EEOC charges and, therefore, are barred from recovering for retaliation under Title VII. Again, this bar is in the nature of a statute of limitation and is not a jurisdictional bar.

II. Sufficiency of Allegations Against Each Separate Defendant

Defendants cite case law stating that complaints seeking damages against government officials are subject to a "heightened standard of pleading with

sufficient specificity to put defendants on notice of the nature of the claim," n27 and should state specifically how each defendant violated the plaintiff's rights. n28 Defendants assert that they are entitled to summary judgment and that Plaintiffs' claims should be dismissed because Plaintiffs have failed to make specific allegations against each separate Defendant. They claim Plaintiffs' allegations are conclusory and without sufficient factual support. Plaintiffs, on the other hand, argue that their Complaint is sufficient under Federal Rule of Civil Procedure 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief.

The essential function of a complaint is to give opposing parties fair notice of the nature and basis for a claim, as well as a general indication of the type of litigation involved. n29 The facts alleged in the complaint must be reviewed in order to determine whether the plaintiffs provided the necessary notice and stated a claim in the manner contemplated by the federal rules. n30 A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. n31 The Eighth Circuit cases cited by Defendants indicate that government defendants should receive adequate notice of specifically how each defendant is alleged to have violated Plaintiffs' rights.

Among other things, Plaintiffs have specifically alleged in their Complaint:

(1) that McCook began a systematic program of harassment and intimidation against Plaintiffs that was designed to undermine Plaintiffs' authority and create a hostile work environment;

(2) that McCook, Williams, and Knickrhem received a formal complaint of the unfair and harassing treatment;

(3) that, in a January 3, 2001 meeting, McCook, Williams, and Knickrhem attempted to blame Bankhead solely for a problem concerning the checking of allotment balances before submitting payroll vouchers; and that other responsible parties were inexplicably absent from the meeting;

(4) that, in February 2001, McCook and Williams devised a scheme to circumvent the competitive hiring process required by the State in order to hire a white, female friend into the OFM; and that McCook hired Holmstrom into a Grade 99 position with the intent of transferring her to a Grade 24 position, thereby circumventing state government advertising and competition requirements; and that Williams advised McCook in this scheme;

(5) that an April 2001 Employee Relations investigation found that McCook had plans to place Holmstrom in a Grade 24

position without competition; and that Williams and Knickrhem took no action after receiving the results of that investigation;

(6) that, after Plaintiffs filed their April 2001 EEOC charges, the harassment and disparate treatment by McCook intensified; and that Plaintiffs were treated differently than similarly-situated white managers;

(7) that McCook, Williams, and Knickrhem intentionally failed and refused to consider or hire Plaintiffs into the position of DHS Business Manager because of their race and instead hired a substantially less-qualified, white female;

(8) that, after Plaintiffs filed their formal complaint with Knickrhem in February 2001, McCook intensified harassment of Plaintiffs, undermining and belittling them publicly and privately and subjecting them to increasingly adverse terms and conditions of employment to punish them for exercising their rights to free speech in violation of the First Amendment;

(9) that, after McCook's acts of retaliation, Plaintiffs complained to both Williams and Knickrhem, who took no action but acquiesced in and condoned the actions of McCook, such that all three Defendants

subjected Plaintiffs to deprivation of their First Amendment rights;

(10) that McCook's intentional race discrimination and retaliation, as well as Williams' and Knickrhem's failure to protect Plaintiffs, constitute state action in violation of Plaintiffs' Fourteenth Amendment rights to equal protection and 42 U.S.C. § 1983;

(11) that McCook and Williams conspired to deprive Plaintiffs of their right to equal protection and equal privileges and immunities in violation of 42 U.S.C. § 1985.

Considering all the above, I find that Plaintiffs have pled sufficiently to give the separate Defendants fair notice of the nature and basis for their claims, as well as an indication of how they claim each Defendant specifically violated their rights. Defendants' request that I dismiss Plaintiffs' claims and grant them summary-judgment on this basis is, therefore, DENIED.

III. Evidence of Race Discrimination, Failure to Promote, Retaliation, and Hostile Work Environment

A. Title VII

Plaintiffs have alleged they were discriminated against on the basis of their race in violation of Title VII based on the facts alleged in their second EEOC charges regarding the failure of DHS to promote either of them to the Grade 24 position.

The production of evidence in a Title VII employment discrimination case is governed by the three-stage, burden-shifting standard of *McDonnell Douglas Corp. v. Green.* n32 Under the *McDonnell Douglas* test, the employee must first establish a prima facie case of discrimination. n33 Once this has been established, the burden shifts to the employer to produce evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. n34 If the employer carries this burden of production, the presumption raised by the prima facie case is rebutted, and the burden shifts back to the employee, who must demonstrate that the proffered reason was not the true reason for the decision but was really a pretext for intentional discrimination. n35 With the *McDonnell Douglas* test, at all times, the burden of persuasion remains on the employee claiming discrimination. n36

1. Whether Separate Defendants Knickrhem, Williams, and McCook, in Their Individual and Official Capacities, Are "Employers" Under Title VII

Defendants argue that Separate Defendants Knickrhem, Williams, and McCook cannot be liable under Title VII because they are not "employers." Title VII prohibits unlawful employment action on the part of "employers." n37 The term employer, as used in 42 U.S.C. § 2000e, means "a person engaged in an industry affecting commerce ... and any agent of such person ...." n38 In *Lenhardt v. Basic Institute of Technology, Inc.*, n39 the Eighth Circuit left open the question whether an individual employee could be liable under Title VII when the employee was the Title VII plaintiff's supervisor. This question was answered in

Spencer v. Ripley County State Bank, n40 where the Court held that supervisors may not be found individually liable under Title VII. n41 Therefore, Defendants' summary-judgment motion on Plaintiffs' Title VII claims against Defendants Knickrhem, Williams, and McCook is GRANTED and those claims are dismissed. n42

2. Whether Plaintiffs Have Produced Sufficient Evidence That They Were Discriminated Against Based on Their Race

Defendants next claim that DHS is entitled to summary judgment on Plaintiffs' Title VII claims because Plaintiffs have failed to produce evidence that they were discriminated against based on their race. Defendants admit that Plaintiffs have stated a prima facie case of discrimination in accord with the *McDonnell Douglas* standard. n43 Plaintiffs admit that Defendants have sufficiently rebutted the presumption by stating that their decision to hire Linda Holmstrom was based on the nondiscriminatory fact that she was more qualified than Plaintiffs. n44 Plaintiffs have the final burden of showing that the Defendants' selection of Holmstrom over Plaintiffs for the Grade 24 position was based on Plaintiffs' race.

Defendants state that Holmstrom was hired into the Grade 24 position because she was more qualified than either of the Plaintiffs. They assert six reasons why she was more qualified: (1) Holmstrom received the highest graded score based upon her interview and application for employment; (2) Holmstrom had both an accounting degree and a CPA license; (3) Holmstrom had previously been employed as a Chief Financial Officer

for over five years for various independent companies; (4) Holmstrom had previous experience in managerial positions; (5) Holmstrom had worked in the areas of finance and tax for approximately twenty years; and (6) Holmstrom had over six years of experience as a state employee in the area of accounting.

Plaintiffs claim that Defendants' proffered nondiscriminatory reason for hiring Holmstrom was not the true reason for the employment decision. Plaintiffs take the position that the facts articulated by Defendants as proof that Holmstrom was more qualified for the Grade 24 position are not true, and are being used as a pretext to justify Defendants' discriminatory acts.

(1) Plaintiffs dispute the allegation that Holmstrom received the highest graded score based upon her interview and application for employment. They claim that the interview was set up as a sham to make it appear that McCook was following proper procedure when, in fact, it was his plan to place Holmstrom into the Grade 24 Business Manager position without any competition. Plaintiffs have produced findings from an investigation conducted by the DHS Office of Employee Relations indicating that McCook initially placed Holmstrom in the Grade 99 position with the intent of quickly transferring her to a Grade 24 position without competition. n45 There is also evidence that McCook prepared Holmstrom to move into the Grade 24 position by assigning her to full-time AASIS training after hiring her when all other employees assigned to AASIS training had several years of experience with DHS or state government. n46 Additionally, Plaintiffs cite a Justification for Hiring attached to a Hiring Freeze

Request as evidence that McCook and Williams were involved in a scam to select Holmstrom to fill the Grade 24 position. Defendants justified their request to unfreeze hiring for the Grade 24 General Business Manager position by stating: "It is needed now because the office is attempting to attract an individual who can help ensure conversion to AASIS ... There is not currently an individual on board with the expertise to do this who has the time to do it." n47

(2) Plaintiffs contest the assertion that Holmstrom was more qualified for the position because she had a degree in accounting and a CPA license. Initially, Plaintiffs point out that the job description posted for General Business Manager did not require that the applicant be licensed as a CPA n48 and that there is evidence showing that McCook knew of Richard Brittain, another employee in payroll who had a CPA license. n49 Also, Holmstrom's resume shows that she had a BSBA with a concentration in accounting. n50 This is the same degree acquired by Plaintiff Ballard. n51

(3) Plaintiffs dispute Holmstrom's qualifications as a Chief Financial Officer. They argue that the term Chief Financial Officer does not have any meaning without a determination of exactly what responsibilities Holmstrom had at each particular company. In Holmstrom's deposition, she stated that she supervised from zero to seven employees in each position she held from 1975 to 2001. n52 Plaintiffs claim that her record does not equal the position of Chief Financial Officer as it is used in state government.

(4) Plaintiffs contest the extent of Holmstrom's previous experience in managerial positions. They claim that Holmstrom never supervised more than seven employees at any time during her thirty-five year career and claim that they possess more managerial experience. Ballard supervised 16 state employees as an Accounting Supervisor II at DHS from 1988 to 1995 and supervised 23 employees as Financial Section Manager at DHS from 1995 to present. n53 Bankhead supervised about 14 employees as Agency Financial Manager with the Department of Youth Services from 1978 to 1981, supervised about 15 employees as Deputy Commissioner for Youth Services from 1981 to 1986, supervised 35 employees as DHS Accounts Payable Manager from 1986 to 1989, and supervised 17 employees as Manager of DHS Payroll from 1995 to present. n54

(5) Plaintiffs claim they both have more experience in the area of finance and tax than Holmstrom. Holmstrom's resume shows approximately twenty-six years of such experience. Ballard's resume shows approximately thirty-one years experience in finance and tax, and Bankhead's resume shows approximately twenty-nine years of finance and tax experience.

(6) Finally, Plaintiffs assert that they have more state experience in accounting than Holmstrom. Holmstrom had over six years of experience as a state employee in the area of accounting; however, as Plaintiffs point out, Holmstrom's experience took place from 1975 to 1981. In comparison, Ballard has over thirteen years experience in state accounting, and Bankhead has over sixteen years in state accounting.

n55 Plaintiffs' experiences are more recent, having occurred between 1986 and the present.

In light of all the above issues raised by Plaintiffs, I find that there is a question of material fact as to whether Defendants' proffered reason for hiring Holmstrom into the Grade 24 position was the true reason for hiring or was a pretext for discrimination. Defendants' request for summary judgment on Plaintiffs' Title VII discrimination claim against DHS is DENIED.

B. Failure to Promote

Defendants claim they are entitled to summary-judgment on Plaintiffs' claims of failure to promote. Plaintiffs have not addressed this argument in their brief.

Title VII makes it an unlawful employment practice for an employer to fail or refuse to hire an individual because of his race. n56 To establish a prima facie case for failure to promote, Plaintiffs are required to show four elements: (1) they belonged to a protected class; (2) they met the minimum qualifications and applied for the position; (3) despite their qualifications they were denied the position; and (4) their employer promoted a person of similar qualifications who was not a member of the protected group. n57 Once Plaintiffs have made a prima facie case, the burden shifts to Defendants to articulate a legitimate, nondiscriminatory reason for the adverse employment action. n58 If Defendants do so, Plaintiffs are then required to prove by a preponderance of the evidence that Defendants'

proffered reason is merely a pretext for discrimination. n59

My analysis of this claim is the same as my analysis above on Title VII discrimination. Plaintiffs have set forth a prima facie case, and DHS has offered the nondiscriminatory reason that it failed to promote Plaintiffs because Holmstrom was more qualified than Plaintiffs for the Grade 24 position. Plaintiffs claim that this reason is a pretext for discrimination, citing facts to indicate that Holmstrom was not more qualified than Plaintiffs. As stated above, I find that there is a question of fact as to whether DHS's proffered reason for hiring Holmstrom was the true reason or a pretext for discrimination. Defendants' request for summary judgment on any claim of failure to promote is DENIED.

C. Retaliation

Defendants' next claim is that they are entitled to summary judgment on the issue of retaliation because Plaintiffs have failed to provide any evidence of retaliation. As discussed previously, Plaintiffs are permitted to assert retaliation under 42 U.S.C. § 1983 but not under Title VII.

An employer may not discriminate against an employee "because he has opposed any practice made an unlawful employment practice ... or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing ...." n60 In order to establish a prima facie case of retaliation, a plaintiff must show that (1) he filed a charge of discrimination; (2) the defendant took adverse

action against him; and (3) the adverse action was linked to the filing of the discrimination charge. n61 Stated another way, a plaintiff must show that he engaged in protected conduct, that he suffered an adverse employment action, and that the adverse action was causally linked to the protected conduct. n62

Defendants assert that the only action that could be considered adverse employment action against Plaintiffs in this case is the fact that neither Plaintiff was selected for the Grade 24 position. Defendants argue that Plaintiffs have presented no evidence to show any link between the lack of selection and either (1) Plaintiffs' internal complaints to Defendants Knickrhem and Williams, or (2) Plaintiffs' EEOC complaints.

Following Plaintiffs' formal complaint to Knickrhem in February 2001 concerning the hiring of Holmstrom, McCook's selective use of the hiring policy, and the fact that they had not been afforded an opportunity to apply for the Grade 99 position, Plaintiffs filed EEOC charges in April 2001. Plaintiffs claim that "soon after [they] filed their EEOC Complaints, the harassment and disparate treatment by Defendant McCook intensified. Plaintiffs' work was scrutinized unfairly and Defendant McCook, with the approval of Defendant Williams, attempted to have Plaintiff Bankhead terminated. He also made threats to terminate Plaintiff Ballard." n63

Considering the facts in the light most favorable to Plaintiffs as I must, I find that Plaintiffs have alleged harassment and disparate treatment in the work environment as adverse employment action resulting from their complaints of discrimination. Plaintiffs claim

that the adverse actions began temporally close to the time when they filed EEOC complaints. On this basis, I find there is a question of fact as to whether Plaintiffs were retaliated against; therefore, Defendants' request for summary judgment on Plaintiffs' retaliation claims is DENIED.

D. Hostile Work Environment

In paragraph 20 of their Complaint, Plaintiffs allege claims for hostile work environment harassment. Defendants argue they are entitled to summary judgment on any hostile work environment claims because Plaintiffs have not met the requirements for showing a hostile work environment. n64 Plaintiffs have not responded to this summary-judgment request-- this is puzzling.

Hostile work environment harassment occurs when "the workplace is permeated with discriminatory intimidation, ridicule, and insult ... that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." n65 To establish a prima facie case, Plaintiffs must show that (1) they belonged to a protected group; (2) they were subjected to unwelcome harassment; (3) the harassment was based upon race; (4) the harassment affected a term, condition, or privilege of their employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action. n66 In order to prove a racially hostile work environment, in addition to proving they were subjectively affected by racially discriminatory behavior, Plaintiffs must prove that the conduct they are complaining of was "sufficiently

severe or pervasive as to create an objectively hostile work environment that altered the terms, conditions, or privileges of employment." n67 In considering whether Plaintiffs have presented evidence of an objectively hostile work environment, the district court must consider all circumstances, including the frequency of discriminatory conduct, the severity of such conduct, whether the conduct was physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interfered with the employees' work performance. n68

In their Complaint, Plaintiffs make only the vague allegation that they were subjected to harassment and intimidation by Defendant McCook which undermined their authority. They offer no more detail. Plaintiffs clearly belong to a protected group and assert that they were subjected to unwelcome harassment based upon race. However, a claim for hostile work environment requires more-- Plaintiffs must show that the conduct complained of was sufficiently severe or pervasive to create an objectively hostile work environment, altering the terms, conditions, or privileges of employment. On the record before me, Plaintiffs claim that they were treated differently than similarly-situated white managers, that their authority was undermined, that their work was closely scrutinized, and that they were threatened with termination. Though such behavior is wrongful, it does not rise to the level of a hostile work environment. Plaintiffs have not shown behavior so severe and frequent that it unreasonably interfered with their work performance. Thus, as Plaintiffs have failed to present any evidence that they were subjected to any discrimination or intimidation which was sufficiently severe or pervasive

to create an abusive working environment, Defendants' request for summary-judgment on Plaintiffs' hostile work environment claim is GRANTED.

IV. Claims Brought Under 42 U.S.C. § 1981

Defendants assert that 42 U.S.C. § 1981 does not provide Plaintiffs with an independent cause of action, arguing that Plaintiffs' § 1981 claim must fail. Defendants cite *Jett v. Dallas Independent School District*, n69 in which the Supreme Court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." n70

Section 101 of the Civil Rights Act of 1991 added the following language at 42 U.S.C. § 1981(c)): "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." Courts have sharply divided as to whether this 1991 amendment supercedes Jett's holding that § 1983 provides the exclusive federal remedy against state actors. Some courts have interpreted the new subsection to allow direct causes of action against state actors under § 1981, doing away with *Jett's* requirement that claimants sue state actors under § 1983 for violations of § 1981. n71 For example, in *Federation of African American Contractors v. City of Oakland*, n72 the Ninth Circuit concluded that the 1991 amendment contains an implied cause of action against state actors, "thereby overturning Jett's holding that 42 U.S.C. § 1983 provides the exclusive federal remedy against state

actors for the violation of rights under 42 U.S.C. § 1981." n73

However, other courts have reached the opposite conclusion. The Fourth Circuit, in *Dennis v. County of Fairfax*, n74 found that the 1991 amendment does not affect the holdings of *Jett*, but merely codifies the holding of another Supreme Court decision, *Runyon v. McCrary*, n75 which said that § 1981 protects against discrimination by private actors as well as state actors. In *Butts v. County of Volusia*, the Eleventh Circuit agreed with *Dennis*, saying:

> Nothing in the 1991 amendment to § 1981 evinces Congress' desire to alter the Supreme Court's conclusion in *Jett*. The express language of subsection (c) states that § 1981 protects against racial discrimination by private and state actors. Put another way, § 1981(c) makes clear that the section creates a right that private or state actors may violate but does not itself create a remedy for that violation. n76

The Eighth Circuit has followed *Jett* as recently as January of this year in *Lockridge v. Board of Trustees of University of Arkansas*. n77 In *Lockridge*, the plaintiff brought race and sex discrimination claims under Title VII, § 1981, and § 1983 based on the denial of equal protection. Though clearly stating that a § 1981 claim against a state actor must be brought under § 1983, the Court liberally construed the plaintiff's complaint "as including claims for violations of ... § 1981 brought under § 1983." n78

Following the lead of *Lockridge*, I liberally construe Plaintiffs' Complaint as if they had asserted their § 1981 cause of action under § 1983. As set forth more throughly below in my discussion of § 1983, a state is not a "person" within the meaning of § 1983, n79 and a § 1981 claim brought under § 1983 cannot be brought against DHS. A § 1983 lawsuit brought against a state official in his "official" capacity is no different from a suit against the state itself. n80 However, state officials are not entitled to sovereign immunity when injunctive relief is sought. n81

Plaintiffs may seek damages under § 1981 through § 1983 against the state officials in their personal capacities. n82 Although the *McDonnell Douglas* test arose in the context of Title VII, the Eighth Circuit has applied its burden-shifting analysis to employment discrimination claims under § 1981. n83 I previously found, under the *McDonnell Douglas* test, that (1) Plaintiffs have stated a prima facie case of discrimination; (2) Defendants have sufficiently rebutted the presumption by asserting that their decision to hire Linda Holmstrom was based on the nondiscriminatory fact that she was more qualified than Plaintiffs; and (3) there is a question of material fact as to whether the Defendants' proffered reason for hiring Holmstrom was a pretext for racial discrimination.

Defendants' summary-judgment motion is GRANTED with respect to § 1981 claims for monetary damages against DHS and the individual Defendants in their official capacities. The summary-judgment motion is DENIED with respect to § 1981 claims against the individual Defendants in their personal capacities.

V. Violation of First Amendment Rights Under 42 U.S.C. § 1983

Defendants assert they are entitled to summary judgment because Plaintiffs have produced no evidence that their First Amendment rights were violated under 42 U.S.C. § 1983. Under § 1983, an action can be brought against a person who, under color of state law or custom, deprives a plaintiff of his or her rights under the Constitution and laws.

To establish a § 1983 claim of unlawful First Amendment retaliation, a public employee must prove that: (1) he spoke out on a matter of public concern; (2) the employee's interest in expressing himself on this matter is not outweighed by any injury the speech could cause to the government's interest; and (3) his protected speech was a substantial factor motivating the adverse employment action. n84 When a public employee speaks on matters only of personal interest, absent most unusual circumstances, a federal court is not the appropriate forum to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. n85 Government officials should enjoy wide latitude in managing their offices without judicial intrusion; however, judicial intrusion may be warranted when employee expression relates to matters of political, social, or other concern to the community. n86 "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." n87 The form and context must be examined to determine whether the employee is acting as a concerned citizen informing the public that its government is improperly

discharging its duties or, rather, as an employee speaking about internal practices relevant only to other employees. n88

Plaintiffs engaged in free speech on February 20, 2001, n89 by filing a joint complaint regarding the hiring of Linda Holmstrom into a Grade 99 position with the OFM. Specifically, Plaintiffs demonstrated concern about Defendant McCook's selective use of the hiring policy and alleged racial discrimination in the promotion practices used by McCook and Williams. They further complained that McCook "has a problem with African-American managers supervising payroll functions" n90 and stated that Holmstrom, a personal friend of McCook's, was placed in a higher-graded position than managers within the OFM who were not allowed to apply for the position. Under similar circumstances, the Eighth Circuit held that the adverse impact which the promotion practices of a sheriff's department could have on its operations made such practices a matter of public concern. n91 I find that case to be analogous to this one.

In addition to complaining about hiring and promotion practices at DHS, Plaintiffs expressed concern that, though Holmstrom had limited state government experience, she was assigned to work full time in the payroll area of the new state accounting system ("AASIS"). Because OFM mangers conducted normal duties in addition to implementing AASIS for their departments, Plaintiffs complained that it was a gross misuse of state funds for DHS to allow the creation of a full-time, Grade 99 position to work the payroll aspect of AASIS. Similarly, they protested that the position created a layer of management that was

unnecessary and could not be justified. I find that Plaintiffs' speech was presented in the nature of a concerned citizen challenging government conduct.

In determining whether the speech was on a matter of public concern, I must also consider the context in which the speech occurred. The Supreme Court has held that a public employee does not give up his right to First Amendment protection when he arranges to communicate privately with his employer rather than to express his views publicly. n92 However, the internal nature of a statement is a factor that must be considered in determining whether the employee is speaking on matters of public concern. n93 In this case, Plaintiffs' complaint was made internally, but it was not solely internal. Though the complaint was addressed to Defendant Knickrhem, a copy of it was forwarded to Brenda Turner in the Governor's office. n94 I find that this demonstrates Plaintiffs' intentions to bring their concerns to the public eye. Considering all the above, I find that the content, form, and context of Plaintiffs' speech show that the speech addressed matters of public concern.

This case is distinguishable from *Sparr v. Ward*, n95 in which the Eighth Circuit found that an internal memorandum from an employee of the Pulaski County Assessor's office was not on a matter of public concern. In *Sparr*, the memorandum was addressed only to the incumbent county assessor and the deputy assessor, both of whom were running for the office of assessor, with a carbon copy for placement in the employee's personnel file. The Court found that the memorandum contained mostly personal comments, driven by the employee's self-interest in protecting her job in the

event that the deputy won the election, which one would not expect to find in speech intended to expose a breach of public trust.

The next inquiry must be whether Plaintiffs' interest in expressing themselves on this matter is outweighed by any injury the speech could cause to the government's interest. Defendants have not alleged that Plaintiffs' speech was in danger of causing any injury to the government's interest.

The final question is whether the protected speech was a substantial factor motivating the adverse employment action against Plaintiffs. Plaintiffs have alleged that the adverse employment action against them came close in time to the filing of their complaints. The mere fact that protected speech precedes an adverse employment decision does not create an absolute inference that the speech motivated the employment decision; however, on the facts before me, I find that the temporal link between the speech and employment action is sufficient to create a question of material fact as to whether Plaintiffs can establish a § 1983 claim for First Amendment retaliation. n96

Plaintiffs also claim they were retaliated against in violation of the First Amendment after they filed a number of FOI requests for information concerning the hiring of Holmstrom. I find that the free flow of public information is of substantial public concern. Again, Defendants have not alleged that Plaintiffs' requests caused any injury to the government's interest. Plaintiffs claim that McCook, Williams, and Knickrhem began a systematic program of harassment against them one week after they put in the FOI requests. As

above, I find that the temporal link between the requests and the alleged harassment is sufficient to create a question of material fact as to whether Plaintiffs can establish a § 1983 claim for First Amendment retaliation.

A. Sovereign Immunity of DHS and Employees in Their Official Capacities

Defendants contend that DHS and Knickrhem, Williams, and McCook, all in their official capacities, are entitled to sovereign immunity on Plaintiffs' § 1983 First Amendment claim. This is not entirely true.

A state is not a "person" within the meaning of § 1983; n97 therefore, a § 1983 claim cannot be brought against a state agency. Accordingly, Plaintiffs cannot bring a § 1983 action against DHS. Also, a lawsuit brought against a state official in his "official" capacity is considered a suit against the official's office, and, therefore, is no different from a suit against the state itself. n98 However, there is an exception to immunity for state officials where injunctive relief is sought: "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official capacity actions for prospective relief are not treated as actions against the state.'" n99

Plaintiffs in this case have requested injunctive relief against Defendants. They ask that Defendants be enjoined from discriminating against Plaintiffs with respect to their employment on the basis of race, engaging in other employment practices that discriminate on the basis of race, continuing to deprive Plaintiffs of their rights to equal protection of the laws

and privileges and immunities under the laws, and conspiring to deprive Plaintiffs of any said rights. Thus, Plaintiffs may proceed against McCook, Williams, and Knickrhem in their official capacities on Plaintiffs' request for injunctive relief. Plaintiffs may not proceed against either DHS or the individual Defendants in their official capacities for monetary relief under § 1983. Defendants' summary-judgment request is GRANTED in this respect.

B. Defendants in Their Individual Capacities

Defendants assert that Knickrhem, Williams, and McCook, in their individual capacities, are entitled to summary judgment on Plaintiffs' First Amendment claims because Plaintiffs have failed to show any causal connection between their complaints and the decision to hire Holmstrom into the Grade 24 position. As set forth above, I find there is a question of material fact as to whether Plaintiffs can establish a § 1983 claim for First Amendment retaliation because there is a question as to whether Plaintiffs' protected speech was a substantial factor motivating the adverse employment action against Plaintiffs by Knickrhem, Williams, and McCook.

Defendants argue that Plaintiffs have failed to show any evidence that Defendants Williams or Knickrhem participated in harassment, the decision to hire Holmstrom, or other specific acts of retaliation. However, as set out above, Plaintiffs assert, in their court Complaint, that Williams advised McCook in a scheme to circumvent the competitive hiring process in order to hire Holmstrom, that Williams and Knickrhem took no action after receiving results of an internal

investigation finding that McCook had plans to place Holmstrom without competition, and that neither Williams nor Knickrhem took any action after Plaintiffs complained to them about McCook's acts of retaliation against them. Some additional allegations are set forth in Plaintiffs' affidavits. n100 I find this evidence is sufficient to allow Plaintiffs to go forward.

Defendants' request for summary-judgment on the issue of a First Amendment violation brought under § 1983 is GRANTED in part and DENIED in part. Plaintiffs may go forward with their First Amendment claims against Knickrhem, Williams, and McCook in their individual capacities, but may not proceed against either DHS or the individual Defendants in their official capacities for monetary relief.

VI. Violation of Fourteenth Amendment Equal Protection Under 42 U.S.C. § 1983

In their Brief, Plaintiffs argue that they have a cause of action for equal protection violations against Defendants Knickrhem, Williams, and McCook in their individual capacities. Defendants, on the other hand, claim that summary judgment is proper because Plaintiffs have produced no evidence that their equal protection rights were violated under 42 U.S.C. § 1983.

"The Equal Protection Clause generally requires the government to treat similarly situated people alike." n101 Therefore, the initial step in an equal protection case must be to determine whether Plaintiffs have demonstrated that they were treated differently than others who were similarly situated for purposes of the challenged government action. n102 Plaintiffs claim

that thier equal protection rights were violated when Defendants McCook, Williams, and Knickrhem conspired and carried out a plan to select a white female for the Grade 24 position. Based on a comparison of the Plaintiffs' qualifications for the Grade 24 position to Holmstrom's qualifications, set out in section III.A.2 above, and the fact that both Plaintiffs and Holmstrom submitted applications for the Grade 24 position, I find that both Plaintiffs and Holmstrom were similarly situated as applicants for the Grade 24 position. n103

The *McDonnell-Douglas* burden-shifting analysis that I applied in section III is also applicable to employment discrimination claims based on the equal protection clause. n104 Using that analysis, I find that Plaintiffs have set forth a prima facie case that Defendants violated their rights to equal protection when they hired Holmstrom for the Grade 24 position. Defendants have met their burden of setting forth a non-discriminatory reason for the hiring. Now, Plaintiffs have the burden of showing that Defendants' reason is nothing more than a pretext for activity which violated their rights to equal protection. Plaintiffs have shown evidence of a scheme to place Holmstrom by attempting to side-step the competitive hiring process and that Holmstrom was placed in a position for which they applied. I find this sufficient to show that a question of material fact exists regarding whether Plaintiffs were denied their equal rights to be considered for and promoted to the Grade 24 position. Defendants' summary-judgment request on the equal protection issue is DENIED.

VII. Violation of 42 U.S.C. § 1985(3)

Defendants request summary judgment on Plaintiffs' claims under 42 U.S.C. § 1985(3), claiming there is no evidence to support the claim. The statute at issue reads, in relevant part:

> If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. n105

Section § 1985(3) does not create substantive rights; rather, like § 1983, it merely provides a remedy for violation of rights designated by it. n106

In order to prove a civil rights conspiracy under § 1985(3), Plaintiffs must show: (1) that two or more Defendants conspired; (2) for the purpose of depriving, whether directly or indirectly, any person or class of

persons of equal protection or the laws or equal privileges and immunities under the laws; and that (3) one or more of the conspirators did or caused any act in furtherance of the object of the conspiracy; (4) causing another person to suffer injury to his person or property or be deprived of having and exercising any right or privilege belonging to a U.S. citizen. n107 The "purpose" element of the conspiracy requires Plaintiffs to prove a class-based "invidiously discriminatory animus." n108 Plaintiffs must "allege with particularity and specifically demonstrate with material facts that the defendants reached an agreement;" they can satisfy this burden by pointing to some facts that would suggest Defendants "reached an understanding to violate [their] rights." n109

Even assuming that Plaintiffs in this case have asserted sufficient evidence of a conspiracy, Defendants cannot be found liable under § 1985(3). There is a bar to Plaintiffs' claims in this regard: the intracorporate conspiracy doctrine. According to the intracorporate conspiracy doctrine, a corporation cannot conspire with itself through its agents when the acts of the agents are within the scope of their employment. n110 The Eighth Circuit has found that the intracorporate conspiracy doctrine is available to governmental entities. n111

As supervisory employees at DHS, McCook, Williams, and Knickrhem are all agents of DHS. According to the intracorporate conspiracy doctrine, they cannot be found liable under § 1985(3) unless they were acting outside the scope of their employment. n112 Plaintiffs have not alleged or set forth any facts to show that Defendants were acting outside the scope of their employment when the alleged violations of §

1985(3) occurred. In fact, all evidence presented by Plaintiffs refers to actions taken by Defendants within the scope of their employment with DHS. Therefore, Defendants' motion for summary judgment on § 1985(3) is GRANTED.

VIII. Whether Individual Defendants, in their Individual Capacities, are Entitled to Qualified Immunity

The individual Defendants, in their individual capacities, claim they are entitled to qualified immunity on all of Plaintiffs' claims. Qualified immunity is a threshold question.

> In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." n113

Qualified immunity is a question of law; however, if there is a genuine dispute concerning predicate facts material to the qualified immunity issue, there can be

no summary judgment. n114 Qualified immunity is an affirmative defense for which Defendants carry the burden of proof. n115

The first question that must be asked by a court required to rule upon qualified immunity is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" n116 If no constitutional right would have been violated were the allegations established, the inquiry into qualified immunity ends; however, if a violation could be made out on a favorable view of the plaintiff's claims, the second step is to ask whether the allegedly violated right was clearly established. n117 The "clearly established" inquiry should be undertaken in view of the specific context of each case. The dispositive inquiry in determining whether a right is clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." n118 If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is proper. n119

The qualified immunity defense fails if an official violates a clearly established right because "a reasonably competent public official should know the law governing his conduct." n120 The Eighth Circuit has taken a broad view of what constitutes "clearly established law" for the purpose of qualified immunity, requiring some but not precise factual correspondence with precedents and demanding that officials apply "general, well-developed legal principles." n121

In *Lockridge v. Board of Trustees of Univ. of Arkansas,* n122 a 5 to 4 decision, the Eighth Circuit found that the defendants in a discrimination case were not entitled to qualified immunity because the plaintiff failed to set forth a prima facie case of discrimination. The case before me is distinguishable from *Lockridge.* Here, a prima facie case of discrimination has already been set forth and rebutted by the articulation of a legitimate, nondiscriminatory reason for the hiring of Linda Holmstrom. I have found that there is a question of fact as to whether Defendants discriminated against Plaintiffs. A reasonable jury could infer that federal rights prohibiting intentional race discrimination were violated by Defendants' actions in hiring Holmstrom.

The next question must be whether those allegedly violated rights were clearly established. The rights for which Plaintiffs have remaining claims against Defendants in their individual capacities are: § 1981, the First Amendment, the Fourteenth Amendment, and retaliation, all remedied under § 1983. To establish a § 1983 violation, Plaintiffs must show that Defendants, while acting under color of state law, deprived them of a federal right.

According to Plaintiffs: "Because the right not to be discriminated against and the right of equal protection are well established constitutional rights, a reasonable person ... would have known that they were violating the constitutional rights of the Plaintiffs" when they conspired to circumvent the state hiring policy by borrowing a Grade 99 position from another division and placing a less qualified white female in this position with the purpose and intent of later transferring her into a competitive Grade 24 position without any

competition and without giving Plaintiffs an opportunity to apply and be considered for the Grade 24 position. I agree.

I am confident that all remaining violations asserted by Plaintiffs implicate general, welldeveloped legal principles. Taking Plaintiffs factual allegations as true and drawing all inferences from the underlying facts in their favor, I find that reasonable officials engaging in the alleged activity would have known that their conduct was in violation of Plaintiffs' constitutional rights. Therefore, the individual Defendants are not entitled to qualified immunity. Defendants' request for summary judgment on the issue of qualified immunity is DENIED.

IX. Punitive Damages

Defendants argue that Plaintiffs have presented no proof of purposeful discrimination or retaliation and no proof of evil intent by any of the Defendants. Plaintiffs, on the other hand, believe the evidence set out above is sufficient to allow a reasonable jury to conclude that Defendants' actions were motivated by an evil intent or taken in reckless or callous disregard of Plaintiffs' federally protected rights.

Punitive damages may not be assessed against a government, government agency or political subdivision under Title VII. n123 Accordingly, punitive damages cannot be assessed against DHS.

A jury may be permitted to assess punitive damages in an action under § 1983 when it is shown that the defendant's conduct was motivated by evil

motive or intent or when the defendant's conduct involves reckless or callous indifference to the federally-protected rights of others. n124 In this case, the jury could find that Plaintiffs are entitled to punitive damages against Defendants in their individual capacities under § 1983. However, I reserve ruling on the availability of punitive damages until the close of trial. At that point, the parties will be permitted to argue whether a jury instruction on punitive damages should be given.

Conclusion

Defendants' summary-judgment motion (doc. no. 18) is GRANTED in part and DENIED in part. The following claims remain for trial: (1) DHS's violation of Title VII regarding Plaintiffs' second EEOC charges; (2) DHS's violation for failure to promote; (3) violations of § 1981, First Amendment, Fourteenth Amendment, and for retaliation under § 1983 (against Knickrhem, Williams, and McCook in their individual capacities and, with regard to injunctive relief, in their official capacities); and (4) availability of punitive damages.

IT IS SO ORDERED this 7th day of May, 2003.

William R. Wilson

UNITED STATES DISTRICT JUDGE

Footnotes

n1 According to an internal office investigation, McCook called the Department of Mental Health Services ("DMHS") and asked to "borrow" a Grade 99 position that was funded through DMHS. He stated

that he wanted to borrow the position because there was an employee he wanted to hire and he wanted to go ahead and put her on the job while other hiring processes were taking place. While she was in the Grade 99 position, Holmstrom's salary was actually paid by DMHS. *See* Doc. No. 23, Exhibit B at 7 and 9.

n2 Doc. No. 18, Exhibit G at 1.

n3 Doc. No. 18, Exhibit G at 3-4.

n4 Plaintiffs point out that there was an employee in the payroll section of DHS who had a CPA license but was not considered for the position.

n5 Doc. No. 23, Exhibit G.

n6 Doc. No. 23, Exhibit J.

n7 Doc. No. 23, Exhibits G and J.

n8 *See* Doc. No. 18, Exhibit H.

n9 *See* Doc. No. 18, Exhibit L.

n10 Defendants contend that they selected Linda Holmstrom for the position because she received the highest grade, based on her application, qualifications and experience, and interviews. Doc. No. 20. Plaintiffs claim, however, that Defendants had planned to preselect Linda Holmstrom by hiring her in the unclassified position and transferring her to the Grade 24 position without competition. Doc. No. 25 (citing Exhibit B at 13-20).

n11 *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); FED. R. CIV. P. 56.

n12 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

n13 *Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 727 (8th Cir. 1979).

n14 *Id.* at 728.

n15 *Id.* at 727-28.

n16 *Counts v. M.K.-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-274 (8th Cir. 1988) (citations omitted)).

n17 *Anderson*, 477 U.S. at 248.

n18 *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484, 486-87 (8th Cir. 1998). *See also Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994).

n19 Doc. No. 18, Exhibit C.

n20 Doc. No. 18, Exhibit E.

n21 Doc. No. 18, Exhibits D and F. *See* 42 U.S.C. § 2000e-5(f)(1).

n22 *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994) (citation omitted).

n23 42 U.S.C. § 2000e-5(b), (c), and (e).

n24 *Spears v. Missouri Dep't. of Corrections and Human Resources*, 210 F.3d 850, 853 (8th Cir. 2000).

n25 The Supreme Court has ruled that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to a Title VII suit in federal court. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982). Rather, the 90-day filing requirement is treated as a statute of limitations.

n26 *Williams*, 21 F.3d at 222.

n27 *Edgington v. Missouri Dep't. of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995) (citing *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989) (holding that damage actions against government officials are subject to a heightened standard of pleading with sufficient precision to put defendants on notice of the nature of the claims and enable them to prepare a response and appropriate motion for summary judgment on qualified immunity grounds)).

n28 *Id.* at 780. *See also Tatum v. Iowa*, 822 F.2d 808 (8th Cir. 1987).

n29 *See Parkhill v. Minnesota Mut. Life Ins. Co.*, 286 F.3d 1051, 1057 (8th Cir. 2002) (citations omitted).

n30 *Id.* at 1058.

n31 *Conley v. Gibson*, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

n32 411 U.S. 792, 800-806, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

n33 Such a prima facie case requires the showing of four elements which are set forth in *Krenik v. County of Le Sueur*, 47 F.3d 953, 957-58 (8th Cir. 1995).

n34 *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).

n35 *Id.* at 507-08.

n36 *Id.*

n37 42 U.S.C. § 2000e-2(a).

n38 42 U.S.C. § 2000e.

n39 55 F.3d 377, 380 (8th Cir. 1995).

n40 123 F.3d 690, 691 (8th Cir. 1997).

n41 *See Bonomolo-Hagen v. Clay Central-Everly Community Sch. Dist.*, 121 F.3d 446, 447 (8th Cir. 1997).

n42 In their Brief in Support of Response to Defendants' Motion for Summary Judgment, Plaintiffs concede that Defendants Knickrhem, Williams, and McCook should not be held individually liable under Title VII. Doc. No. 24 at 9.

n43 Doc. No. 19 at 17.

n44 Doc. No. 24 at 11.

n45 Doc. No. 23, Exhibit B at 19, 16-17.

n46 Doc. No. 23, Exhibit B at 17, 19

n47 Doc. No. 23, Exhibit D.

n48 Doc. No. 18, Exhibit G.

n49 Doc. No. 23, Exhibit F.

n50 Doc. No. 18, Exhibit I.

n51 Doc. No. 23, Exhibit G.

n52 Doc. No. 23, Exhibit H at 12-22.

n53 Doc. No. 23, Exhibit G.

n54 Doc. No. 23, Exhibit J.

n55 Doc. No. 23, Exhibits G and J.

n56 *See* 42 U.S.C. § 2000e-2(a).

n57 *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1126 (8th Cir. 1998).

n58 *See Marzec v. Marsh*, 990 F.2d 393, 395 (8th Cir. 393).

n59 *Id.*

n60 42 U.S.C. § 2000e-3(a).

n61 *Cronquist v. City of Minneapolis*, 237 F.3d 920, 929 (8th Cir. 2001).

n62 *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999).

n63 Doc. No. 24 at 16.

n64 Though not argued by Defendants, it should be noted that neither Plaintiff presented a hostile work environment claim to the EEOC under Title VII; thus, any claims of hostile work environment can only be brought under § 1983.

n65 *Jacob-Mua v. Veneman*, 289 F.3d 517, 522 (8th Cir. 2002) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)).

n66 *Ross v. Douglas County, Nebraska*, 234 F.3d 391, 395 (8th Cir. 2000).

n67 *Willis v. Henderson*, 262 F.3d 801, 808 (8th Cir. 2001).

n68 *Id.* at 809 (citations omitted).

n69 491 U.S. 701, 732-34, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989).

n70 *Id.* at 733. *See also Williams*, 21 F.3d at 224 (holding that 42 U.S.C. § 1983 provides the exclusive federal damage remedy for violations of the rights guaranteed by § 1981 when the claim is against a state actor).

n71 A list of cases and commentary on the dispute are gathered in *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996).

n72 96 F.3d 1204 (9th Cir. 1996).

n73 *Id.* at 1214.

n74 55 F.3d 151, 156 n. 1 (4th Cir. 1995).

n75 427 U.S. 160, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976).

n76 222 F.3d 891, 894 (11th Cir. 2000).

n77 315 F.3d 1005, 1007 (8th Cir. 2003) (citing *Artis v. Francis Howell North Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1181 (8th Cir. 1998)).

n78 *Id.* at 1007.

n79 *Will v. Michigan Dep't. Of State Police*, 491 U.S. 58, 64-68, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).

n80 *Id.* at 71 (citations omitted).

n81 *Id.* at 71, n. 10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)).

n82 *See Egerdahl v. Hibbing Comm. College*, 72 F.3d 615, 619 (8th Cir. 1995).

n83 *Roxas v. Presentation College*, 90 F.3d 310, 315-17 (8th Cir. 1996).

n84 *See Connick v. Myers*, 461 U.S. 138, 142, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983); *Pickering v. Board of Educ. of Township H.S. Dist. 205*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).

n85 *Connick*, 461 U.S. at 147.

n86 *Id.* at 146.

n87 *Id.* at 147-48.

n88 *Calvit v. Minneapolis Public Schools*, 122 F.3d 1112, 1117 (8th Cir. 1997).

n89 Plaintiffs also filed a complaint at DHS alleging retaliation. The DHS Office of Employee Relations conducted an investigation and found that Plaintiffs could not state a prima facie case of retaliation because Plaintiffs did not have "any knowledge that Mr. McCook had knowledge of the complaint" at the time of the alleged retaliatory activities. Doc. No. 18, Exhibit B.

n90 Doc. No. 23, Exhibit L at 2.

n91 *Powell v. Basham*, 921 F.2d 165, 167 (8th Cir. 1990).

n92 *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979).

n93 *Buazard*, 172 F.3d at 549.

n94 Doc. No. 23, Exhibit L.

n95 306 F.3d 589 (8th Cir. 2002).

n96 *See Mathews v. Trilogy Comms., Inc.*, 143 F.3d 1160, 1166 (8th Cir. 1998); *Barnard v. Jackson Co., Missouri*, 43 F.3d 1218, 1226 (8th Cir. 1995).

n97 *Will v. Michigan Dept. Of State Police*, 491 U.S. 58, 64-68 (1989).

n98 *Id.* at 71 (citations omitted).

n99 *Id.* at 71, n. 10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)).

n100 Doc. No. 23, Exhibit N and Q.

n101 *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

n102 *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994).

n103 In their summary-judgment Brief, Defendants assert that Plaintiffs and Holmstrom are not similarly situated because Holmstrom was in a Grade 99 position when she applied for the Grade 24 position, unlike Plaintiffs who were both in Grade 22 positions. On the facts before me, I do not find that this fact is relevant.

In addition, here and in other sections of their Brief, Defendants argue that, because only one position was available, only one of the Plaintiffs could have been chosen if Holmstrom was not chosen. Though this argument may have some place in the remedy phase of this case, it is not relevant to the decision I render today.

n104 *Lockridge*, 315 F.3d at 1010.

n105 42 U.S.C. § 1985(3).

n106 *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372, 60 L. Ed. 2d 957, 99 S. Ct. 2345 (1979).

n107 *Larson by Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996).

n108 *Id.*

n109 *Id.*

n110 *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985).

n111 *Id. See also Larson*, 76 F.3d at 1456; *Richmond v. Board of Regents of the Univ. of Minn.*, 957 F.2d 595 (8th Cir. 1992) (applying intracorporate conspiracy doctrine to preclude § 1985 claim against state university and various university officials).

n112 Notwithstanding the intracorporate immunity doctrine, Plaintiffs' claims under § 1985(3) fail due to a lack of sufficient facts. Plaintiffs attempt to prove the conspiracy by stating that: (1) in accordance with DHS policy, McCook could not hire Holmstrom without having the hiring decision approved by Williams and Knickrhem; and (2) following the internal investigation that revealed McCook was attempting to circumvent the competitive hiring process, (a) Williams and Knickrhem took no action, and (b) Williams and McCook put in a request to terminate a hiring freeze on the Grade 24 position. Speculation and conjecture do not suffice to prove the existence of a conspiracy. *Mettler v. Whitledge*, 165 F.3d 1197, 1206 (8th Cir. 1999).

n113 *Saucier v. Katz*, 533 U.S. 194, 200-201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001) (internal citations omitted).

n114 *Greiner v. City of Champlin*, 27 F.3d 1346, 1352 (8th Cir. 1994).

n115 *Sparr*, 306 F.3d at 593.

n116 *Saucier*, 533 U.S. at 201. *See also Lockridge*, 315 F.3d 1005.

n117 *Id.*

n118 *Id.* at 202.

n119 *Id.*

n120 *Sparr*, 306 F.3d at 593 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)).

n121 *Id. See also Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir. 1988).

n122 315 F.3d at 1009.

n123 *Id.*

n124 *Smith v. Wade*, 461 U.S. 30, 56, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983).